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CONSIDERATION *v. CAUSA* IN ROMAN-AMERICAN LAW.

IN the case of *Mtembre* v. *Webster,* decided recently (1904) in the Supreme Court of Cape Colony, South Africa, the court (DE VILLIERS, J.) says that the *causa* of Roman-Dutch Law (oorsaak—German *Ursache*) has become for all practical purposes equivalent to the valuable consideration of the Common Law.[1] The court says further, 'I can not find that in practice any gratuitous promises except donations—as to which there are especial rules—were ever enforced by law.' Sir Frederick Pollock in commenting on this case says, "The power of the Common Law to impose its conceptions on foreign systems when opportunities occur deserves more attention than it has yet received from comparative jurists."

The contact of Spanish-Roman Law with the Common Law here in America has been very similar to that of the Dutch-Roman Law with the Common Law in South Africa, and the question naturally arises whether this victory of consideration over *causa* in South Africa will be duplicated in our Porto Rican courts.

The Civil Code of Spain of 1889, in discussing the cause of a contract, says (Art. 1274) "*En los contratos onerosos se entiende por causa, para cada parte contratante, la prestación ó promesa de una cosa ó servicio por la otra parte; en los remuneratorios, el servicio ó beneficio que se remunera, y en los de pura beneficencia, la mera liberalidad del bienhechor.*" This is translated in the Porto Rican Code (Sec. 1241) as follows: "In contracts involving a valuable consideration, the prestation or promise of a thing or services by the other party is understood as a consideration for each contracting party; in remuneratory contracts the services or benefits remunerated, and in those of pure beneficence, the mere liberality of the benefactor." The *causa* of the Spanish is throughout translated by the English term 'consideration.' It may be noted that Walton[2] translates *los contratos onerosos* more accurately by the simple paraphrase "onerous contracts." The distinction between the "onerous" contracts and "remuneratory" contracts does not appear at this point in the Code, but the lack of differentiation between them does not concern us in this enquiry because in both forms it is evident that the *causa* is the equivalent of English consideration; namely, detriment to the promisee; but in the "contracts

[1] Cf. *Law Quart. Rev.* 20, p. 349. A case which seems to be the same as this one is referred to in the *Journal of the Society of Comparative Legislation,* New Series, No. XIV, p. 528, under the name of Temfu *v.* Webster; and in *The Juridical Review,* June, 1905, p. 163, a case apparently the same is cited as Tembu *v.* Webster.

[2] Civil Law in Spain and Spanish America. Trans. of the Civil Code, Art. 1274.

of pure beneficence," in which the *causa* (consideration?) is "the mere liberality of the benefactor" will be found the difficulty of interpretation. This is evidently the *contrat de bienfaisance* of the Code Napoléon (See Art. 1105) in which the *causa* of modern Roman Law is broader in application than is the English consideration.[3] The question naturally arises how these so-called "contracts of pure beneficence" will be handled by the Porto Rican courts. Will the mere intention of conferring a gratuitous benefit be a sufficient consideration for a binding unilateral promise? The solution of this problem in our other Roman-American codes has been found in the more or less complete assimilation of the modern Roman *causa* to English consideration. The Civil Code of Quebec[4] speaks of "a lawful cause or consideration" as one of the four requisites to the validity of a contract, without apparently making any distinction between cause and consideration. The amalgamation of Spanish-Roman Law with the Common Law in Porto Rico during this century is liable to duplicate the legal history of Louisiana during the past century where the conditions of contact of the two systems have been almost exactly what they now are in Porto Rico. I have therefore thought it wise to study the history of consideration as it has developed in the successive Codes and Supreme Court Decisions of the State of Louisiana.[5]

There is a popular fallacy that Louisiana has French Law. This is only a partial statement of the fact. During the Spanish domination of the territory, from the close of the Seven Years War to 1803, the Spanish law became the law of the land and has since persisted. However, when the law was codified in 1808, it is probable that the codifiers took the *projet* of the French Code, which was then published, as an outline for their work and wherever the Spanish law coincided with the French law, the wording of the French Code was adopted.[6] French commentaries have, too, had a very marked influence on the interpretation of Louisiana law. The Code Napoléon and the commentaries thereon have also had a great influence on the codifiers of the Spanish Code of 1889, and the Porto Rican codifiers drew freely on the Louisiana Code in their revision of the Spanish Civil Code. It is necessary therefore to take into account the various cross threads in order to get a view of the somewhat

[3] Cf. Pollock, Principles of Contract, Chap. IV, p. 152.

[4] Art. 984.

[5] There is apparently no doubt in the minds of Louisiana lawyers that consideration is to-day in their State practically synonymous with cause, but that this result has been reached in spite of, and not because of, the wording of the Code on the subject and the elaborate theorizing of the Court thereon, borrowed from the treatises of Domat, Pothier and other French jurists, seems never to have been recognized.

[6] The Laws of Lousiana, by Hon. E. T. Merrick, Am. Law Reg. 22, p. 6.

complicated idea of consideration as it appears in the Roman-American Codes.

To begin with the significant passage of the Louisiana Civil Code:[7] "CAUSE IS CONSIDERATION OR MOTIVE. By the *cause* of the contract in this section is meant the consideration or motive for making it; and a contract is said to be without a cause, whenever the party was in error, supposing that which was his inducement for contracting to exist, when in fact it had never existed, or had ceased to exist before the contract was made." This article of the Louisiana Code is an addition to the discussion of the character of *cause,* not found in the Code Napoléon.[8] All the articles of the Code Napoléon on the subject of "*cause*" are reproduced in The Digest of the Civil Laws in Force in the Territory of Orleans, printed in 1808,[9] and were copied in The Civil Code of the State of Louisiana, published in 1825,[10] but in this Code of 1825 there was an attempt made, in an additional article, to define "cause," as used in the Louisiana Code, in terms of the analogous English consideration.[11] But the question arises, what was the meaning of this definition in the minds of the Louisiana revisers? Does this mean (a) Cause = Consideration = Motive? or, does it mean (b) Cause is either Consideration or Motive? *i. e.,* sometimes one thing, sometimes the other? To put the case a little more definitely, when "cause" is used in the Louisiana Code does it mean English consideration, which would exclude from the field of contracts the so-called "contracts of pure beneficence," or does it mean the *cause* of the Code Napoléon (*causa* of the Spanish Code) in accordance with which such conventions are included within the contractual relation? This is all the more puzzling because the Louisiana Code

[7] La. Civ. Code, Art. 1896 [1890].

[8] The term "*cause*" is found in four articles of the Code Napoleon:

Art. 1108, "*une cause licite dans l'obligation,*" as one of the four essentials of a contract.

Art. 1131, "*L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite ne peut avoir aucun effet.*"

Art. 1132, "*La convention n'est pas moins valable quoique la cause n'en soit pas exprimee.*"

Art. 1133, "*La cause est illicite, quand elle est prohibee par la lois, etc.*" Cf. Peterson. The Evolution of "Causa" in the Contractural Relations of the Civil Law, Bulletin of the University of Texas, No. 46, p. 17.

[9] Cf. Bk. III, Title III, Chap. II, Of Preliminary Dispositions, Art. 8, Of Conditions Essential to the Validity of Agreements; and Bk. III, Title III, Chap. II, Sec. IV, Arts. 31-33.

[10] Arts. 1772 and 1887-1889.

[11] C. C. of La. Art. 1890 [= 1896 of the Code of 1870]. It seems probable that this addition to the Code of 1825 was the work of Livingstone, to whom most of the Common Law additions to this revision of the Louisiana laws are usually attributed.

has admitted "*le contrat de bienfaisance*" of the Code Napoléon in its so-called "Gratuitous Contracts."[12]

The first of the two interpretations suggested above would seem to be the more likely one in the minds of the Louisiana Code makers from the fact of the omission of the "either" as a preliminary adversative, coördinate with the "or," also from the fact that in the explanation of the definition that *Cause is Consideration or Motive* the further statement is added, "By the *cause* of the contract in this section, is meant the consideration or motive for making it," in which "the" is used before "consideration" but not before "motive." If however it does mean this, we may say that the statement is not true, Consideration is *not* Motive. I promise to pay my son a quarter for work in the garden. The consideration is the small—very small—amount of service I expect to get for my money, my motive is to teach the boy habits of industry. Motive is the purpose that an obligor has in binding himself, consideration is the sufficient legal reason for holding him bound.[13] The two may be identical, but they may be different. This has been clearly laid down by the United States Court.[14] "It is not to be doubted that there is a clear distinction sometimes between the motive that may induce to entering into a contract and the consideration of the contract. Nothing is consideration that is not so regarded by both parties. It is the price voluntarily paid for a promisor's undertaking. An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is the cause or meritorious occasion requiring a mutual recompense in fact or in law."

If, however, the second meaning were the one the Louisiana revisers had in mind, when we say that "cause is consideration or motive;" *i. e.*, either one or the other according to circumstances, we would seem to imply that cause in the Louisiana Code has the same meaning as it has in Articles 1131-1133 of the Code Napoléon. These articles are based on the theory of cause laid down by Pothier in his Traité des Obligations, published in 1761, and in commenting on them Peterson says, "Considering now the meaning of cause in these articles, it will be necessary to distinguish between the contracts *à titre onéreux* and those *à titre gratuit.* In the former the cause is always some *quid pro quo* furnished at the request of the

[12] La. C. C. Art. 1773 [1766], "To be gratuitous the objeect of a contract must be to benefit the person with whom it is made, witnou any profit or advantage, received or promised, as a consideration for it. It is not, however, the less gratuitous if it proceed either from gratitude for a benefit before received, or from the hope of receiving one hereafter, although such benefit be of a pecuniary nature." Cf. Code Napolèon, Art. 1105.

[13] Cf. Peterson, op. cit. p. 19.

[14] Philpot *v.* Gruninger, 81 U. S. 577 (1871).

obligor, usually by the obligee: in the bilateral contracts it consists in a promise to give or do something; in the unilateral, in something given or done. In the contracts *à titre gratuit* the cause is no longer a *quid pro quo,* but must be found in the will or desire of the obligor to benefit the obligee, such will or desire being taken in connection with the facts or circumstances upon which it is based and by which it is explained." With either interpretation we are unable to determine the meaning of the Code from the Code itself, and must go to the decisions of the Court for further elucidation. As preliminary to this investigation it may be well to state the two points in which the Continental *causa* differs from English consideration:

(1) *Causa* is broader than consideration: "In contracts of beneficence the liberality which one of the parties intends to exercise towards the other is a sufficient cause for the engagement contracted in his favor."[16]

(2) *Causa* is narrower than consideration: One may not stipulate for the benefit of another without having either before or at the time of the agreement, any personal interest that it shall be done.[17] Now in the contract of beneficence, the cause is not a performance nor a promise but is the *desire* of exercising liberality toward the other party. It is, in other words, the *motive* for making the contract, not the *consideration* on which it is made. Let us see whether this is what motive means in Article 1896 [1890] of the Louisiana Civil Code, so far as that article has been interpreted in the decisions of the Supreme Court of Louisiana.[18]

From a study of these cases it will be found that the terms "motive," "cause," "consideration," "object" and "purpose" are used by the court with varying meanings and it may be well to get distinct meanings for these terms before we begin our discussion of them.

Motive = the purpose the obligor has in binding himself.

Cause = the sufficient, legal reason (in French law) for holding him bound.

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[15] Op. cit. p. 17.

[16] Pothier, On Obligations (Evans' Translation) [42]. Pollock says the same holds true in modern French law. Cf. "Principles of Contract," Chap IV, p. 152 and notes.

[17] Cf. Pothier (Evans) [60]. Pollock, in discussing this, says it arises from a mistaken extension of the old Roman adage *alteri stipulari nemo potest,* and that as a technical rule of law slight circumstances are laid hold of to exclude its application. Cf. op. cit. p. 153.

[18] Of the several hundred cases bearing on the subject in general (166 on consideration alone), I quote only the most significant ones. The Supreme Court Reports begin in 1811. The first case which I have found involving the subject of consideration, came up in 1812, 2 La. Rep. (Martin O. S.) 219. The case was remanded for new trial. The point at issue seems to have been, what was the motive of the parties? Were their motives at one so that a contract ever came into existence by implication?

Consideration = the sufficient, legal reason (in English law) for holding him bound.

Object = the performance to which an obligor is bound.

The first case which reached a decision in the Supreme Court was passed on in 1822. It was that of *Le Blanc* v. *Sanglair*.[19] The defendants, sued on their promissory note payable to R. Prudhomme or bearer, pleaded it had been given for a consideration which had failed, viz., in payment of the price of a mulatto, who was addicted to redhibitory vices; that as soon as they discovered this, they gave public notice of their intention not to pay it, etc. The court (MARTIN, J.) said: "There is no difference between a want and a failure of consideration. Each may be set up as a defense, not only against the original payee, but also against the endorsee, who took the note with a knowledge of an equitable circumstance entitling the maker to avail himself of the defense. 3 Johns. 124 and 465; 7 id. 26; 8 id. 20; 10 id. 198 and 231; 11 id. 50. 5 Mass. 299; 6 id. 457. Chitty on Bills, 84, a." The case is worthy of citation only as showing that the Louisiana Court, at this early date, makes no distinction between *want* and *failure* of consideration, though Pollock in discussing the meaning of *sans cause* as used in the Code Napoléon and the French commentaries says, 'it seems to be confined to cases of what we should call total failure (as distinguished from mere absence) of consideration.'[20] The statement of the court as to the identity of *want* and *failure* of consideration is however mere dictum. The case was decided on the score of failure of consideration. The maker of the note was in essential error as to the nature of the slave bargained for, and the contract was really never consummated because the parties never reached a true *aggregatio mentium*. The cause or consideration was false and gave rise to no sufficient motive, and the case rests on exactly the same basis in either English or Roman law.[21]

In the case of *Louisiana College* v. *Keller*,[22] decided in 1836, the defendant put his name to a paper in which he promised to pay the sum of $500 to any person who might be appointed to receive the same, on behalf of a college, to be established at Jackson, La., on the express condition that the college should be established at the next session of the legislature; the legislature at its next session did establish and endow the college. Held: that defendant was

[19] 12 Martin (O. S.), 403.

[20] Principles of Contract, p. 153.

[21] The case of Barron *v.* Cazeaux, 5 La. Rep. 78 (1833), simply decided that changing a conditional obligation into an absolute one was a good consideration or cause for a contract. It adds nothing to our knwledge f the relation of consideration to cause.

[22] 10 Louisiana Rep. (Curry) 164 (1836).

bound. The court (BULLARD, J.) said, "An obligation according to the Code is not the less binding though the consideration or cause is not expressed. We are not informed as to the consideration of this promise by any thing on the face of the papers. It may have been the advantage the defendant expected to derive from the establishment of a college at his own door, by which he could save great expense in the education of his children, or it may have been a spirit of liberality and a desire to be distinguished as a patron of letters. Whatever it may have been, we see nothing illicit in it, nothing forbidden by law, and the promise binds him, if he consented freely and the contract had a lawful object. In contracts of beneficence the intention to confer a benefit is a sufficient consideration." Altho' the court here uses the term consideration, he is evidently talking about the French *cause*, for he speaks of the contract as, possibly, one of beneficence and says in the words of Pothier that in such contracts the "intention to confer a benefit is sufficient consideration." The case might well have been decided on the theory of mutual promises made by the defendant and the State.[23] It should be noted that this case comes nearer than does any other to deciding that the mere liberality of the benefactor is sufficient cause (consideration) for a contract.

In the case of *Durive* v. *Freer*,[24] decided the next year, the court uses the word "motive" to describe a tacit condition in a contract. The question at issue was whether there was a fair implication from the circumstances under which the contract was made that each party understood that the sale was made subject to a condition that if a sale had been made by the factors of the seller before word of this sale reached them, then this sale by the principals should be void. It is evident that "motive" as used here does not mean the purpose that the obligor had in mind in binding himself,' nor does it mean 'the sufficient legal reason for holding him bound.' In other words, this has nothing to do with the cause or the consideration of the contract but simply with a disputed term in the agreement. We are dealing here not with the fourth requisite of a contract, but with the second, the *consensus animorum* of the parties.

In the somewhat confused or badly reported opinion in the case of *Relf and Zacharie* v. *McDonough*[25] the Court quoting Art. 1818 of

[23] Cf. Anson (Knowlton), Contracts, p. 72, note.

[24] 11 La. Rep. 374 (1837). The facts in this case were that one of the plaintiffs came to the defendant's plantation to purchase his crop of sugar, and was informed that he might have it at the price he offered, but was told that the defendant had before that time given orders to his commission merchants in New Orleans to dispose of it. On hearing afterwards that they had done so, the defendant declined to deliver the sugar to the plaintiffs.

[25] 19 La. Rep. 140 (1841).

the Code says, " 'The reality of the cause is a kind of precedent condition to the contract without which the consent would not have been given, because the motive being that which determines the will, if there be no such cause where one was supposed to exist, or if it be fully (?) [falsely] represented, there can be no valid consent.' Here the representations made by the creditor, by the production of his account, were that he had a right to claim the interest; he actually claimed them [it?], and both parties may have believed at the time that they were [it was?] justly and rightfully due; but those representations turned out afterward to be unfounded, and there was no valid consent on the part of the defendants to the contract. By the cause of the contract is meant the consideration or motive for making it. Thus if Relf and Zacharie were induced to sign the notes, because they believed that the interest carried in the account was due, there was no cause or consideration, they were in error and their obligation can have no effect." In this case the motive and the consideration may be said to coincide because the reason (motive) that the signers of the notes had in mind was the existence, supposed, of a consideration for them, and because it was afterwards found out that the debt for interest did not exist, the consideration for the notes was null and the motive in giving the consent ceased to operate, thus preventing a *consensus*. It may be noted here that BULLARD and MARTIN, JJ., dissented on the ground that the interest was actually owed. Although the court discusses the relation of cause to motive in this case, it is evident that the case was decided without reference to the motive, or to motive as cause in the French sense, but simply with reference to the consideration. This is shown by the argument in the dissenting opinion of BULLARD and MARTIN, JJ. The reason for their dissent was that they believed that as a matter of fact the interest was due for which the notes were given. The decision and dissent are in perfect harmony with the English theory as to the nature of consideration.

The case of *Gravier's Curator* v. *Carraby's Executor*,[26] decided in the same year, rests on the ground that the court will not interfere between mutual wrong doers. It simply leaves them where it finds them. The unlawfulness of the attempt made by the parties puts the stamp of nullity not only on the "cause" as the Code[27] says but upon the whole transaction. This case too would have been decided in exactly the same way in an English court. The parties to an attempt at an unlawful transaction would be simply thrown out of court.

[26] 17 La. Rep. 128 (1841).
[27] Cf. Civ. Code, Art. 1895 [1889].

In the case of *Mouton* v. *Noble*[28] goods sold at auction were settled for by the auctioneer (Noble) by payment of $50 and notes for the balance. The judge of the Commercial Court held that, as no consideration was proved for receiving the notes or for the time allowed, the agreement to give time was not binding on the creditor, and did not discharge the sureties and they were therefore held still liable. The Supreme Court (EUSTIS, C.) held that sufficient consideration was to be presumed from the conduct of the parties. He said in his opinion, "The requiring of a small pecuniary consideration to support an agreement is a mere fiction which the civil law has never adopted. * * * 'An obligation without a cause, or with a false cause, or unlawful cause can have no effect.' Civ. Code 1887. Pothier explains the sense of this principle and describes what is meant by want of consideration necessary for the validity of an obligation. In contracts of mutual interest the cause of the agreement is *the thing given or done, engaged to be given or done, or the risk incurred* by one of the parties; and in *contracts of beneficence* the liberality which one of the parties wishes to extend to the other is *sufficient consideration.*. But when an engagement has no cause, or consideration, or what is the same thing, where the cause for which it is contracted is *false*, the engagement is null, and the contract based on it is also null and can not be enforced by an action. Money paid under such an agreement can be recovered back by the *actio condictio sine causa.* The civilians use the term cause in relation to obligations in the same sense as the word consideration is used in the jurisprudence of England and the U. S. It means the motive, the inducement to the agreement, *id quod inducet ad contrahendum,* 6 Toullier, 166." It is plain that this whole discussion of the nature of consideration is *obiter dictum* but it is also evident that the meaning of "consideration" in the mind of the court is the meaning which the continental jurists give to *causa,* not that which English jurists give to consideration. It is plain, too, that no distinction is made between motive as the impelling purpose in the formation of contract and cause as the legal reason for holding one bound. The court repeats the provisions of Art. 1887 of the Code and all of Pothier's comment bearing on the same theme, including his statement that in 'contracts of pure beneficence the liberality which one of the parties wishes to extend to the other is sufficient consideration (cause),' but the case is decided on the English principle that the agreement to extend the time of collection of the old obligation was sufficient consideration for the notes given to secure it.

[28] 1 La. An., 193 (1846).

In the case of *Union Bank* v. *Beatty*[29] the Court (SPOFFORD, J.) says, "It is only necessary that the contract between the debtor and the creditor should be valid as between themselves to lay a sufficient foundation for the accessorial engagement of the surety; because the legal consideration or *cause juridique* of the latter contract is to be found in the service rendered the principal by the surety acceding to his obligation at his instance and thus giving him a credit he might not otherwise enjoy; and if the principal contract be valid, the law looks only to the presumed beneficence of the surety as the cause of the obligation, and therefore holds him bound, no matter how unfounded may have been those interior motives of interest or confidence which really led to the act of beneficence." The court speaks of the "beneficence of the surety as the *cause* of his obligation" and "cause" thus used certainly means "motive" instead of "consideration." The consideration of the surety is of course the same as that of the principal,[30] and that consideration is detriment to the promisee (in this case the plaintiff Bank) in parting with other securities for that furnished by the sureties on the note. This discussion of the "beneficence of the surety as the cause of the obligation" seems to squint at the idea of the mere liberality of the benefactor being *une cause suffisante* of a contract of surety, but the case is decided as it would be in an English court, on the ground that the added security is part of the consideration on which the original contract was made.

In *Hoggatt* v. *Gibbs*,[31] the court (BUCHANAN, J.) held that 'the clause of the will requiring an heir to relinquish her lawful claim as heir to one-third of a property, exceeding in amount $100,000, on receiving $20,000 cash from the executors, under penalty of complete disinherison, was contrary to law and therefore not a valid cause or consideration for the deed of relinquishment, Civ. Code, Arts. 1613, 1616, 1488, 1506.' By the citations of the Code to sanction this decision, it is evident that the unlawfulness of the consideration arose from the violation of specific provisions in regard to the method of disinherison or from the duress practised. The question as to whether a smaller sum might be taken as a consideration or in satisfaction of a larger sum was not considered by the court, and therefore the Louisiana case gives us no light on this point which has given so much trouble to the English courts.[32]

The facts in the case of *Smith* v. *Morse*[33] were that Smith & Co.

[29] 10 La. An., 385 (1855).

[30] Cf. Dillingham *v.* Jenkins, 7 Sm. & M., 486.

[31] 12 La. An. 770 (1857).

[32] Decided erroneously according to Professor Ames in Foakes *v.* Beers, 9 App. Cases (House of Lords) 605 (1882). See *Harv. Law Rev.* 12, p. 527.

[33] 20 La. An. 220 (1868).

had promised (in 1859) to furnish ice to Morse and Co. at $17.50 a ton for five years, with a rebate, given for past favors, making the price $15.00 net. In 1861 they agreed that the price 'to be paid for ice shall be temporarily raised' to $30 per ton. "It is further agreed that the written contract is not in the least impaired by said temporary arrangement." Smith and Co. after sued for the price of some of the ice delivered, and Morse & Co. sued for the rebate. Held: that the rebate should be allowed; because Smith and Co. had made that agreement. The question of consideration for the extra price of ice was not discussed. Although this case resembles the Michigan Ice Case[34] it was really decided on the wording of the contract and therefore it gives us no light on the principle involved in the Michigan case.

The series of cases in reference to slave consideration[35] affect the subject of mercantile law particularly, and the effect of State constitutional provisions thereon. They have no bearing on the nature of consideration as such.

In the case of *Broaddus, Bettis & Co.* v. *Nolley, Andrews & Co.*,[36] the plaintiffs appeal from the judgment rejecting their demand against the defendants, the sureties on the bond to release the property sequestered in the case of the plaintiffs against Neeley & Herrin. At the time of the sequestration the property (cotton) of Neeley & Herrin was under provisional seizure for rent. It was released on bond in both cases, the defendant being surety on said bonds. Bettis of plaintiff firm told Andrews of defendant firm that if he would persuade the plaintiff in provisional seizure to dismiss his suit, Broaddus, Bettis & Co. would do the same. Andrews then paid the plaintiff in the provisional seizure case and the suit was dismissed, but nevertheless afterward the plaintiffs in the case against Neeley & Herrin caused judgment to be entered, contrary to and in violation of said agreement. Held: "It is no defense to a suit to plead that the plaintiff had said to the defendant he would discontinue his suit, if somebody else would do the same. Such a promise would neither discharge the debt nor bar the action because an agreement without consideration is not obligatory."

This opinion by JUSTICE WYLY was concurred in unanimously by the rest of the court but nevertheless it would seem that, although the decision is correct, it was hardly put on the right ground. There certainly seems to have been ample consideration for the

[34] Goebel *v.* Lynn, 47 Mich. 480.

[35] Campbell *v.* Waters, 21 La. An. 325 (1869); Groves *v.* Clark, 21 La. An. 567 (1869); Succession of Weil, 24 La. An. 139 (1872); McLean *v.* Elliot, 26 La. An. 385 (1874). Cf. also Cummings *v.* Saux, 30 La. An 207 (1878).

[36] 25 La. An. 184 (1873).

original promise of Bettis to dismiss his sequestration suit, in the payment by Andrews of the claim of the plaintiff in the provisional seizure. This payment was certainly detriment to Andrews, it was also benefit to Broaddus, Bettis & Co., because it left their security to be obtained by the sequestration unaffected by the prior claim of the plaintiff in provisional seizure. It did not however bar the claim of Broaddus, Bettis & Co. to final satisfaction for their claim. There was consideration for the forbearance to prosecute; that is, to give time, on the claim of Broaddus, Bettis & Co., but not for its abrogation. The suit hinges, however, on the question as to what the consideration was given for: whether for the postponement or for the abrogation of the suit. It throws no light on the nature of consideration as such.

In the case of *Benner* v. *Van Norden*,[37] Benner and others had instituted suit in bankruptcy against a company in which Van Norden was interested. Benner dismissed the suit on payment by Van Norden of $15,000, of which amount $5,000 was paid in cash and the balance in notes of $2,500 each, Benner transferring to Van Norden 800 shares of stock in the company. After a judgment in favor of the defendant there was a rehearing and the former decree was set aside on the ground that "the consideration for the notes was good. The motives which influence a person to exercise a legal right do not destroy that right or affect its enforcement. Article 1856 Civil Code declares: 'If the violence used be only legal constraint or the threats of doing what the party using them has a right to do, they shall not invalidate the contract' * * * Mr. Justice Story says a valuable consideration 'may, in general terms, be said to consist either in some right, interest, profit or benefit, accruing to the party, who makes the contract, or some forbearance, detriment, loss, responsibility, or act, or labor, or service, on the other side. And, if either of these exist, it will furnish a sufficiently valuable consideration to sustain the making or indorsing a promissory note in favor of the payee or holder' * * * whether the stock had market value or not, the existence of the stock is not denied. 'He who sells a credit or an incorporeal right warrants its existence at the time of the transfer.' C. C. 2646. There is no lesion in such sales and the defendant can not get relief." The court (LUDELING C., J.) here implies a distinction between motive and consideration in the statement that "the motives which influence a person to exercise a legal right do not destroy that right or affect its enforcement," but quotes with approval Judge Story's definition of consideration which is the familiar one of benefit to the promisor or detriment to the promisee.

[37] 27 La. An. 479 (1875).

In the case of *Chafee Syndic* v. *Scheen & Husband*[38] an act of *datio in paiment* was passed, purporting to transfer real estate to Mrs. Scheen in consideration of a half interest in a partnership of Scheen & Bradley which it was stated Bradley, the father of Mrs. Scheen, had given her and which was valued at $10,000. Later she attempted to show that there was other consideration and Article 1900 [1894] of the Civil Code was relied on to save the case. The court (TODD, J.) said, "where there is a real consideration for a contract, and there must be such a consideration in all valid contracts, yet if that consideration is described in the act as one thing and in fact is another thing, which the parties contemplated at the time, in connection with each other, and merely called the one for the other in the act, the act is valid, and to support it the consideration may be explained in the evidence. * * * If the thing conveyed was that which both or either of the parties was not thinking about, or had not in their minds at the time, or the price or consideration stipulated, and which they had exclusively in contemplation at the time, had no existence or was false, then the contract in either case was void. And no other thing afterward thought of and no other consideration which they might have made the price or cause of the contract, will ever rehabilitate it or cure its nullity."

The reasoning in this case though referred to as a discussion of consideration seems rather to be pointed toward the *consensus animorum* and the "object" of the contract. There must be, says the court, "an *aggregatio mentium* both as to the thing and as to the * * * consideration." We are dealing here with likeness of motive that constitutes the "meeting of minds" not the mark of the law that makes the agreement actionable. The interpretation of Article 1900 (1894) to the effect that it applies only in case there is a misdescription of the consideration and can not be used to make an agreement for the parties as to a consideration that neither had in mind at the time the contract was made, rests on the principle so commonly applied in English law that the courts will not make agreements for the parties.

The case of the *Wardens of St. Louis* v. *Bishop of New Orleans*[39] is the only one I have found in which there is a specific discussion of the "object" of a contract. In this case it is enunciated that the relation between the Wardens and the Bishop was not one that 'had for its object the gratification of some intellectual enjoyment, either of religion, morality or taste.' On the contrary the pleadings themselves asserted that the Bishop had not preached

[38] 34 La. An. 688 (1882).
[39] 8 La. Rep. (Robinson) 51 (1841).

"as required by the canons and laws of the church." In other words, the agreement had never been brought under the jurisdiction of the secular court by the agreement of the parties.

The resumé of these cases shows that the Louisiana judges of the early times rely upon the French commentaries in all their arguments as to the nature of "cause" or as they indifferently call it "consideration," in spite of the additional provision of the Code of 1825, which seems to have been added with the idea of interpreting French *cause* in terms of English consideration. The doctrine of Pothier is the one constantly quoted and followed. I have found no citation of any other French authority with the exception of Toullier who is cited by JUDGE EUSTIS in the case of *Mouton* v. *Noble*, quoting Toullier's definition of *cause* as being *id quod inducet ad contrahendum.* It may be noted in passing that this definition was immediately recognized by the followers of Toullier as being too indefinite, and Demante, his successor, makes the ordinary distinction between cause and motive by calling the former *la cause déterminante de l'obligation* and the latter *la cause impulsive du contrat.*[40]

But although the judges of the first half of the century quote French commentary, in which the mere liberality of the benefactor is spoken of as *une cause suffisante,* they decide the cases in accordance with the English principle that cause must be detriment. In *Louisiana College* v. *Keller* (1836) the court says that the contract may have had a material consideration or that the consideration may have been a spirit of liberality, and that in either case the consideration would have been good and was good. But, as has been said, there was in the case, detriment to the promisee, in the reciprocal promise. With similar dicta in *Mouton* v. *Noble* (1846) the case is decided on the principle of English consideration. These dicta are repeated in succeeding cases and it is not until we get down to 1875, in the case of *Benner* v. *Van Norden* that the court gets over to a citation of the English definition of consideration, and in the same case attempts to make the distinction between motive and consideration. In the few cases that have come before the court since that time there seems to be no tendency to go beyond the well established doctrine of English consideration. It would seem that the Louisiana court has reached the same position on this subject as has the South African (Cape Colony) court in *Mtembre* v. *Webster,* above quoted, but before we can go to this conclusion we must examine the decisions and dicta of the Louisiana court on the subject of pacts, donations, and gratuitous contracts to deter-

[40] Cf. Peterson, op. cit. p. 18.

mine the attitude of the court on the subject of consideration when approached from other points of view.

The statement of the Digest of Justinian[41] that "a nude pact does not produce an obligation" has been frequently borrowed by modern courts and commented upon in the discussion of the distinction between an enforceable and a non-enforceable convention. Let us see how the Supreme Court of Louisiana has handled the subject of pacts as distinguished from contracts.

In the case of *Huie* v. *Bailey*[42] the court (GARLAND, J.) says: "To make any agreement for indulgence obligatory it must be for an adequate consideration, Chitty on Bills, 8th Am. Ed. 441-443, 446; Kent's Commentaries 2nd Ed. 111, 112. The old opinion was that any agreement to give time, discharged the drawer and endorsers whether without consideration or not; but the later doctrine is, a delay without *sufficient consideration* and without taking any new security, being a *nudum pactum,* will not discharge other parties, if the holder has not entered into such an agreement as will disable him from suing the acceptor." The term *nudum pactum* is here used as equivalent to a contract without consideration, and such a convention is said to have no effect on the liability of a surety. The extension of this principle, in the case of *Frazer* v. *Dick*,[43] so that the consent by the surety to a delay prevents him from claiming discharge, rests on the hypothesis that such agreement of the surety is a consideration for the delay.

In the case of *Campbell* v. *Lambert*[44] an agreement was made "that Lambert & Co. should deliver to Campbell such quantities of coal as may be required * * * to the extent of 60,000 barrels." The ourt (FENNERY, J.) said, "It is manifest that the agreement is a *nudum pactum.* We scan the provision in vain to find the imposition on Campbell of any obligation to take or pay for any amount of coal whatever." The term *nudum pactum* is here used simply to describe a transaction which fails to become a contract because one of the parties promises nothing. The contract fails of consummation because a definite agreement as to its subject matter is never reached.

In the case of *Bellocq et al.* v. *Gibert et al.*[45] it was alleged that Gibert and his wife made a verbal agreement to pay plaintiffs a certain amount out of the price of some property which Mrs. Gibert had sold, and the payment of which was resisted, if they, the

[41] Dig. II 14, 7, 4. *Nuda pactio obligationem non parit.*
[42] 16 La. Rep. 218 (1840).
[43] 5 La. Rep. (Robinson) 251 (1843).
[44] 36 La. An. Rep. 35 (1884).
[45] 36 La. An. 565 (1884).

plaintiffs, would make a renunciation in her favor of any rights the plaintiffs might have to the property. The renunciation was made, but Gibert after the death of his wife, refused to pay the amount promised or any part thereof. The court (TODD, J.) said, "the agreement could not, in whatever light we regard it, be held a *nudum pactum* as the defendant counsel contended." Here, too, the term means a contract without consideration.

It is evident that the term is used rather loosely as applying to an agreement or other similar transaction which has no legal effect, without enunciating clearly just what the reason for this lack of effect is.

The provisions of the Code Napoléon[46] as to donations and gratuitous title are practically reproduced in the Louisiana Civil Code.[47] Article 893 of the French Code says, "A man shall not be allowed to dispose of his property except by donations during life or by will, in the form hereafter established." Art. 931 of the Code Napoléon says all acts importing donations during life shall be passed before notaries in the ordinary form of contracts." The Louisiana Code (Arts. 1536 and 1538) requires in addition to the notary that there shall be "two witnesses." The Louisiana Code[48] also classifies "donations *inter vivos*" into:

(1) The one purely gratuitous or that which is made without condition and merely from liberality.

(2) The onerous donation, or that which is burdened by charges on the donee.

(3) The remunerative donation or that the object of which is to recompense for services rendered. There seems to be no corresponding classification of donations in the Code Napoléon.

The most of the decisions in the Louisiana Reports on the subject of gifts turn on the question of the legality of attempted transfers reprobated by law; for example, those to concubines, but none of them give us any light on the question of the 'gratified liberality of the benefactor' being a sufficient consideration for the promise to give a gift.

In the case of *Holmes et al.* v. *Patterson*[49] the Court (MARTIN, J.) says, "the bill of sale was made *for value received.* * * * And as in the present case it does not appear that there was a *serious* price [cf. Pothier, *contrat de vente,* n. 16] there is *no* price. 'A price,' says Pothier, which has no proportion to the thing sold, is not a *true* price, as if a valuable tract of land be sold for a crown, Id. 20.

[46] Code Napoleon, Arts. 893-895.
[47] La. Civ. Code, Arts. 1467 (1453)-1469 (1455).
[48] La. Civ. Code, Art. 1523.
[49] 5 Martin (O. S.), 693 (1818).

But the defendant counsel shows that a deed *for value received* is good, *Jackson* v. *Alexander*, 3 Johns., 484." The court says further, "the instrument is valid, at least as a deed of gift, although the donor died without having delivered either the deed or the property. Cf. Fuero Real, 3, 12, 16." It is evident that the court views the transaction as a contract because of the presence, technically, of sufficient consideration, though it might have been upheld as a deed of donation, in accordance with Spanish law.

The facts in the case of *Barthe* v. *Succession of La Croix*[50] were that in 1864 La Croix told two friends that he felt under obligations to the plaintiff and directed to be drawn up and attested by them a note for $500 in plaintiff's favor payable at La Croix's death. This note was kept by Barthe until destroyed by fire a year or more afterward. The court (SPENCER, J.) said in regard to this, "In one sense it was a gratuity; *i. e.*, he was under no legal obligation to do so. In another sense it was the fulfillment of a natural obligation. We think there was good and valid consideration for the note. Under this view, it becomes unnecessary to pass upon the question raised as to the validity of donations disguised under the form of onerous contracts."

In like manner in the case of *Dupler* v. *Feigel*[51] the court simply decides that we are dealing with a contract for which there is abundant consideration.

In the *Succession of Rabasse*[52] suit was brought on an instrument running as follows: "One year after date I promise to pay to my own order the sum of $25,000 for value received, with interest at 7 per cent from this date till perfect (or full) payment.

"Signed,

"E. RABASSE."

This instrument was never endorsed but was delivered in person by Rabasse to opponent's father, Jean Maury, for a valuable consideration as mentioned therein. Jean Maury, who was a professional cook, had for many years entertained Rabasse at his house with delicately cooked viands and skillful service. The opponent (Miss Maury) had acquired the above document from her father for a valuable consideration. The court (NICHOLS, C. J.) said, "Delivery by the maker to a particular person even though accompanied by words indicative of a gift or donation of the same, does not stand in lieu of nor is it a substitute for, nor is it the equivalent of an endorsement. * * * As matters stand the instrument declared on is fatally defective viewed either as a *note*, a *donation*

[50] 29 La. An. Rep. 326 (1877).
[51] 40 La. An. Rep. 848 (1888).
[52] 49 La. An. Rep. 1406 (1897).

proper or a *remunerative donation.* A party contemplating making a donation must see to it, whatever be the act of instrumentality which he proposes to employ as the medium for carrying out his intentions, that it fulfills in itself all the conditions of regularity required to give efficacy to that particular act. * * * The services rendered are not of such a character as would imply or give rise to an expectation on the part of those who rendered them that they would be remunerated, nor on the part of those who received them that they would be called on to do so. They are services which do not give rise to debt or remunerative donations but might very legitimately and naturally give rise to donations proper." This transaction is evidently viewed as it would have been in an English court, and there is no hint in the decision of any thought of a 'mere intention of conferring a gratuitous benefit being a sufficient consideration for a binding unilateral promise.'

The case of *Spanier* v. *De Voe*[53] adds nothing to our knowledge except a discussion of our equity doctrine of the inadequacy of consideration forming a proper subject of equitable enquiry. The case of *Sinnot* v. *Bank*[54] makes a formal distinction between *donatio causa mortis* and *donatio mortis causa,* turning on the formal definition of each.

The various cases on improvements on public land[55] as a consideration, all hold that improvements on public land prior to the maturing of the title of the same may be valuable consideration. Closely connected with these is a series of cases carrying us out of the Louisiana State courts to the decisions of courts formed out of the Louisiana Territory.[56] These cases all turn on the question as to whether land granted by the sovereign authority to a married person belongs to the marital community or to the individual.

In the case of *Gayoso* v. *Garcia*[57] Judge MARTIN says, "the law most positively says it [such land] shall not be common to both; but that it shall belong exclusively to the individual to whom the King grants it, Nov. Recop. liv. 10, tit. 4, leyes. 1, 4 y. 5, Febr. p. 1."[58] The decision in this case was reiterated in *Frique* v. *Hopkins*[59] though Judge PORTER there added that the wife has a right to one-half the improvements on such property as she would have had on any other property belonging to her husband. These two

[53] 52 La. An. Rep. 581 (1900).

[54] 105 La. An. Rep. 706 (1900-1901).

[55] 1 La. Rep. (Robinson) 51 (1841); Bryan *v.* Glass, 6 La. An. Rep. 740 (1851); Spurlin *v.* Milliken, 16 La. An. 217 (1861).

[56] These are discussed at considerable length in the Am. St. Rep., Vol. 96, p. 916 ff.; cf. also Am. Dec. Vol. 16, pp. 186, 187.

[57] 1 Martin, N. S. 334 (1823).

[58] Translated in Yates *v.* Huston, 3 Tex. 453 (1848).

[59] 4 Martin, N. S. 221 (1826).

cases are reviewed and the original principle again stated in *Roquier's Heirs* v. *Roquier's Executors.*[60] There is a dictum in a later Missouri[61] case to the effect that "if it appeared that the concession was made upon a consideration which was a burden on the community, the case would be an exception to the general rule."

A difference of construction under a similar set of circumstances in the two jurisdictions has given rise to two different rules: (1) The Texas Rule, illustrated in the case of *Yates* v. *Huston,* above referred to,[62] in which one league of land was granted to a married pair on condition of payment of $165, for the issuing of the title, and that the land should be cultivated within two years. It was held by the court that this was a grant on onerous title to the community; first because, "it would seem that where the government requires by public order, a sum of money so considerable in amount to be paid before the issue, and as an indispensable condition to its delivery, that the grant could not be regarded as a pure donation;" second because, "the fields are to be opened, and the lands stocked with cattle with the assistance of the [husband's] partner and the expenditure of their joint funds." (2) The California Rule, enunciated in the case of *Noé* v. *Card,*[63] which gives the opposite decision on facts that are almost the same. In this case a fifty *vara* lot, in what afterwards became the city of San Francisco, was granted to a married man on condition that within one year it should be fenced and a house constructed thereon. Fifteen and five-eighths dollars were paid as municipal fees on the transfer. The court (Justice FIELD) said, "Both Noé and the officer treated the matter as a donation to which certain conditions attach. The house and the fence were to be built for the benefit of the donee and not for the government. There was therefore no consideration in the performance of these acts moving toward the government, which can be regarded in the nature of a price."

The California Rule, in accordance with the Louisiana cases, preserves the old Spanish concept that such transactions are donations and not contracts on consideration, but the California court in its attempt at explaining why such conditions do not form a proper consideration for a contract seems to waiver between the concept, on the one hand, that consideration is determined by what the parties *thought* about the transaction and, on the other hand, that the benefit must move toward the promisor. In all these cases however "consideration," if it is held to exist at all, is consideration

[60] 5 Martin, N. S. 98 (1826).
[61] Wilkinson *v.* Amer. Iron Mountain Co., 20 Mo. 129 (1854).
[62] See note 58.
[63] 14 California, 576 (1860).

in the English sense; namely, benefit to the promisor or detriment to the promisee, and no transaction with liberality as *une cause suffisante* for a contract is acknowledged.

The history of the converse characteristic of French *cause* in the Louisiana system, namely, in that particular in which it is narrower than English consideration, is much simpler. The technical nature of the extended application in French law of the Roman adage, *alteri stipulari nemo potest,* seems to have been recognized very early by the Louisiana court. In the case of *Mayor* v. *Bailey,*[64] decided in 1818, the court (MARTIN, J.) says, "According to the principles of the Roman law, a third person not a party to a contract had no action to compel the performance of any stipulation therein and these principles were adopted in Spain. Part. 5, 5, 48. But by the laws of the Ordinamiento Real, 3, 8, 3, these principles are abrogated and a direct action is given to a third party. 2 Gomez 700, n. 18. In the English common law books, decisions are to be found to support both sides of this question, but those in which the action was denied seem to predominate. 1 Comyns on Contract, 26." Three years later ,however, we find a limitation on this doctrine, pronounced by the court (PORTER, J.) in the case of *Gales Heirs* v. *Penny,*[65] "the only ground on which it can be at all alleged, that the plaintiffs have sustained injury by the defendant's promise to the sheriff, is, that in consequence of it, their ancestor was induced to sign the bond, which has since been paid by his representatives. But this is too remote a consideration to form the ground of legal responsibility, and it would be carrying the doctrine on this head, to a dangerous extent, to say, that because A has promised B to do a certain thing, and fails to do it, that C can maintain an action for the breach of this promise, because a knowledge of that promise was the leading motive that induced him to contract with B."

According to Judge Merrick's annotation of the Civil Code[66] it was because of the decision in *Gravier* v. *Gravier*[67] that the old Roman rule *alteri stipulari non potest* was formally reversed in the Louisiana Code.[68] In this case John Gravier had taken the administration of his brother's estate with the agreement that, in consideration of the transfer to him of certain land, he would pay certain creditors of the estate and account to the coheirs for their respective shares in balance of the same. It was decided by the court that,

[64] 5 Martin (O. S.), 321 (1818).
[65] 9 Martin (O. S.), 215 (1821).
[66] Cf. Merrick, Revised Civil Code of Louisiana, Art. 1890.
[67] 3 Martin (N. S.), 211 (1825).
[68] Article 1890 of the Civil Code of 1870 reproduces Article 1884 of the Civil Code of 1825. No such provision appears in the Digest of Laws of 1808, under the discussion of the Object and Matter of a Contract.

"he who has stipulated in favor of another may revoke the stipulation any time before acceptance."

The provisions of Art. 1884 [1890] have, however, been strictly construed. In *Fluker* v. *Turner*[69] Judge MATHEWS says, "[one] can not absolve himself from the obligation, arising out of his promise to [another] by offering as a set-off debts which may be owing him from persons who are not parties to the present action." In *Union Bank* v. *Bowman*,[70] Judge SLIDELL says, "it is true that one in whose favor a stipulation is made by another, may bring an action to enforce it, though not a party to the contract. Cf. C. P. 35; C. C. 1884, 1896. These Articles do not, however, estop the parties making the stipulation from setting up equities; and the right to do so must be determined by a recurrence to such general principles of law and justice as regulate the subject of contracts, and especially the contract of sale." In the case of *New Orleans St. Joseph Association* v. *A. Magnier*[71] the Court (VOORHEIS, J.) says, "the text [of Art. 1884] is clear that the advantage must be the condition or consideration of the contract, hence it is that a penal obligation can not be stipulated for the benefit of third persons."[72]

Recapitulation.

No case is decided by the Louisiana court prior to 1882 in which the doctrine of consideration is involved. The decision of this year says there is no difference between want and failure of consideration. The Civil Code of 1825 reverses the old Roman doctrine *alteri stipulari non potest* and thus disposes of the class of cases in which *cause* is narrower than consideration. The case of *Louisiana College* v. *Keller* (1836) talks of consideration as if it were equal to French *cause; i. e.*, included the "liberality of the benefactor" in the category of consideration, but does not decide the case on that principle. That the case of *Mouton* v. *Noble* (1846) repeats, *in dicta* the argument of the French commentators as to the nature of consideration previously laid down in the case of *Louisiana College* v. *Keller*, but decides strictly in accordance with the English doctrine of consideration. The case of *Benner* v. *Van Norden* is decided in accordance with English principle and incorporates in the decision

[69] 4 Martin (N. S.) 551 (1826).

[70] 9 La. An. Rep. 196 (1854).

[71] 16 La. An. Rep. 338 (1861).

[72] The several other cases of Marigny *v.* Remy, 3 Martin (N. S.) 607 (1825); Thompson *v.* Linton *et al.*, 6 Martin (N. S.) 578 (1828); Gas Co. *v.* Paulding, 12 La. Rep. 380 (1845); Bell *v.* Ann Lawson and Husband, 12 La. Rep. 154 (1845); Watt *et al. v.* Rice, 1 La. An. Rep. 280 (1846); Bonnafe *v.* Lane, 5 La. An. Rep. 228 (1850); N. O. & C. Ry. *v.* Chapman, 8 La. An. Rep. 981 (1853), though decided under the provisions of Article 1884, add nothing to the interpretation of it.

the English definition of consideration. The cases of *Smith* v. *Morse* (1868) and *Hoggatt* v. *Gibbs* (1877), though involving the vexed question of English law, as to whether a promise given for the performance of a preëxisting contractual duty is good consideration, throw no light on that subject. The *Succession of Rabasse* (1897) makes distinctions between a gift and a contract similar to those made in our English system. The statement of Article 1896 [1890] of the Louisiana Civil Code that "Cause is Consideration or Motive," seems then to have meant to the courts down to 1875, resting on the dicta of the two cases above quoted, that cause is either consideration or it is motive; *i. e.,* they thought they were dealing with French *cause,* but they decided the cases on the basis of English consideration. After 1875 the court seems to be thinking about English consideration in the theorizing on the subject and of course continues to decide cases on the basis of English theory.

The situation then in Louisiana, where English Common Law has come in contact with Spanish-Roman Law, may be summed up in the exact words of the South African judge in his statement as to the influence of English Common Law on Roman-Dutch Law, "I can not find that in practice any gratuitous promises except donations—as to which there are special rules—were ever enforced by law."

What are the Porto Rican courts going to do about it? The Quebec Code speaks of cause or consideration as if they were identical. The Louisiana Code starts out with the ambiguous definition above cited but gets around to the practical application of the same principle. The South African Court (Cape Colony) states squarely that *causa* is equivalent to the valuable consideration of the Common Law. The Porto Rican Code repeats the essential provisions of the Louisiana Code in regard to the distinctions between gifts and contracts, but it also copies the very definite statement of the Spanish Civil Code in regard to the contract of pure beneficence,[73] and it would seem that this would oppose a much more effective barrier to the elimination of Continental *causa* from the Porto Rican system by the interpretation of the courts than has the more ambiguous wording of the Louisiana Civil Code. On the other hand, a literal adherence to the wording of the provision of the Porto Rican Code would be an easy way to make in effect a valid gift without delivery and in the words of Professor Willis-

[73] "In contracts of pure beneficence the mere liberality of the benefactor is understood as consideration." Cf. P. R. Civ. Code, Sec. 1241—Sp. Civ. Code, Art. 1274.

ton, "it may well be doubted whether the courts would sanction such a result."[74] It seems likely that further legislation will be necessary on this point in Porto Rico in order to solve the difficulty.[75]

JOSEPH H. DRAKE.

UNIVERSITY OF MICHIGAN.

UNIFORM STATE LAWS GOVERNING NEGOTIABLE DOCUMENTS OF TITLE.*

OUR forefathers, not foreseeing that the States would some day become one country for commercial purposes,[1] failed to vest in Congress power to regulate *all* commerce, but limited that body to such as was interstate or foreign.[2] An unexpected (and by many now believed erroneous) decision by the Supreme Court of the United States[3] in 1869, that a contract between citizens of different states did not constitute interstate commerce, checked the growth of that unity of law so convenient in the development of industries, national in character. For one hundred years, from 1789, when the Constitution was adopted, to 1890, no practical remedy was presented to free commercial intercourse from the inconvenience of a distinct law for each state. In the latter year, New York created a commission on uniform state laws and called for a National Conference to which some thirty states responded.[4] The present year marks their fifteenth annual meeting. The first fruit of this movement was the Negotiable Instruments Code framed in 1896, now

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[74] *Harv. Law Review*, Vol. 8, p. 35; cf. Holmes, Common Law, 304.

[75] It may be noted that the South African (Transvaal) Court has settled the question by the decision that *causa* in the Civil Law has nothing to do with consideration of modern English Law. Cf. *Law Quart. Rev.* 20, p. 235.

*An address delivered before The Ohio Bankers Association, at Cleveland, Ohio, September 27, 1905, by Francis B. James, of the Cincinnati Bar, President of the Ohio State Board of Uniform State Laws and Chairman of the Committee on Commercial Law of the Commissioners on Uniform State Laws in National Conference.

[1] Mr. Justice Bradley in Oregon S. Nav. Co. *v.* Winsor (1874), 20 Wallace 64.

[2] Constitution United States, Art. I, Sec. 8.

[3] Paul *v.* Virginia (1869), 8 Wallace 168. See also Liverpool Ins. Co. *v.* Oliver (1871); 10 Wallace 566; Hooper *v.* California (1895), 155 U. S. 648; New York Life Ins. Co. *v.* Cravens (1900), 178 U. S. 389; Nutting *v.* Mass. (1902), 183 U. S. 553. Compare Pensacola Telegraph Co. *v.* Western Union Tel. Co. (1878), 96 U. S. 1; Champion *v.* Ames (1903), 188 U. S. 321; New York Life Ins. Co. *v.* Statham (1876), 93 U. S. 24; New York Life Ins. Co *v.* Davis (1877), 95 U. S. 425.

[4] The States now represented in the Conference are Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia and Washington.